payment of damages, subject to the provisions of Chapter II of the Specific Relief Act 1950.

'Specific goods' have been defined by s 2 of the Ordinance to mean goods identified and agreed upon at the time the contract of sale is made. The contract of sale in this case is the memorandum and at AB15, the machines have been identified by description, model number and serial number. As such, there is no doubt that the goods are specific or ascertained.

Our s 58 is in pari materia with s 52 of the English Sale of Goods Act 1979 except for the exclusion of a reference to statutory provisions similar to Chapter II of our Specific Relief Act 1950. In deciding whether or not to make an order of specific performance, in addition to determining the type of goods in question, the court is entitled to look to all the surrounding circumstances of the case including the conduct of both the buyer and the seller and to consider the hardship which an order would inflict on the seller.

In *Behnke* v *Bede Shipping Co Ltd*,[2] a ship was held to be a specific chattel in respect of which an order for specific performance could be made. The judge in that case took account of the fact that the ship in question was of peculiar and practically unique value to the buyer, that the buyer wanted the ship for immediate use and damages would not be an adequate remedy.

PW1 testified that he had been in the business of buying and selling heavy equipment machines for the past ten years. In May 1987 he had asked his brokers in Malaysia to locate such machines, and they directed him to the defendant. He inspected the machines and when he had decided to purchase them, caused an advertisement, AB94, to appear in the Singapore *Straits Times*, offering the same machines for sale. Some buyers had answered his advertisement as evidenced by the invoices at AB24, 26, 27, 72 and 75, even before the plaintiff had come into possession of the machines. It has now been pleaded that the loss of trading relations with these buyers in the event of non-delivery on its part entitles it to have the memorandum specifically performed.

I do not consider that the plaintiff's obligations to third parties can form the basis of a decree of specific performance especially so in this case when such obligations were incurred before the subject matter of such sales had come into the plaintiff's possession.

If anything at all the plaintiff must show that the machines are not easily available in the market and as such they are of a unique interest and value to it. In this respect, PW1 testified that it was possible to buy similar machines in the market in large quantitites. This evidence is further enforced by DW1 stating that bulk sales of such machines is possible in the market after a large project has been completed or if one is prepared to look from place to place. Since such goods can be located in the market, either singly or in bulk, I do not consider that the test of their unique value has been discharged by the plaintiff and on this ground alone I consider that damages is an equally adequate remedy for the defendant's breach.

Consequent upon my finding that the defendant had breached AB15-16, I now make the following orders in favour of the plaintiff:

(1) general damages for breach of the memorandum and that the amount when assessed is to be contraed against the repair cost of the three machines also to be assessed;
(2) damages to be assessed on the loss of agency rights over the machines listed at AB17-18;
(3) the defendant's counterclaim in so far as it does not relate to the plaintiff's liability for repair costs of the three machines is dismissed;
(4) defendant to pay the costs of the whole action.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *Shook Lin & Bok*.

Reported by *PS Ranjan*

Bertam Consolidated Rubber Co Ltd v Pemungut Hasil Tanah, Seberang Perai Utara, Butterworth

HIGH COURT (PENANG) – LAND REFERENCE NO 15-9-82
EDGAR JOSEPH JR J
31 DECEMBER 1988

Land Law – Compulsory acquisition of land – Compensation award by Collector of Land Revenue – Reference to court – Fair market value – Principles of determining compensation – Whether fair market value subject to constraint imposed by s 214A of National Land Code 1965 – Res judicata – Claim for severance and injurious affection – Loss of crops – Cost of new drains and fencing – Cost of alternative road – Insurance – Recoupment of fees paid by objectors – Interest rate applicable – Land Acquisition Act 1960, s 36(1)

This was a reference to court of an award made by the Collector of Land Revenue, Butterworth under s 36(1) of the Land Acquisition Act 1960 ('the Act') in respect of the compulsory acquisition by the government of the State of Penang of 32.2841 acres of land, being part of oil palm estate land, known as Bertam Estate, the total area of which is approximately 5,000 acres, the property of the objectors. The date of the publication of the declaration under s 8 of the Act that the land concerned was to be compulsorily acquired for purposes of a public road was 13 September 1979 and it is that date which is material for purposes of determining its fair market value. At the inquiry before the Collector held at the Butterworth Land Office on 22 October 1980, the objectors made a claim based upon a valuation made by Williams, Talhar & Wong, chartered valuers, for

$1,314,090. On 17 December 1981 the Collector offered $639,994.05 as full compensation for the land acquired and for severance and injury. The objectors on 25 February 1982 required the Collector to refer for the determination of the court, pursuant to the provisions of s 37(1) of the Act, of his award relating to loss of the land acquired, on the ground that they objected to the amount of the compensation specified therein. The questions for determination were:

(i) what was the fair market value of the land acquired at the material time?
(ii) what was the appropriate sum to award for injurious affection?
(iii) whether the court should require the state government of Penang or the drainage and irrigation department to give the undertaking aforesaid or, in default, what is the appropriate compensation to award or appropriate order to make in lieu of the undertaking?
(iv) what is the appropriate sum to award for consequential loss?
(v) what other reliefs (if any) should be awarded in favour of the objectors?

Held:

(1) The three recognized methods of valuation of land compulsorily acquired under acquisition legislation are:

(a) the opinion of expert valuers;
(b) the price paid, within a reasonable time, in bona fide transactions of purchases of the land acquired, or of the lands adjacent to the land acquired and possessing similar advantages; and
(c) a certain number of years' purchase of the actual or immediately prospective profit from the lands acquired.

The most reliable guide in determining fair market value is evidence of sale of the same or similar land in the neighbourhood, due allowance having been made for the particular circumstances of each case.

(2) The objectors in the present case are barred by res judicata or issue estoppel from contending that the acquired land is not subject to the restriction imposed by s 214A of the National Land Code. In the circumstances, the acquired land is subject to the restrictions imposed by s 214A of the Code.

(3) There is explicit statutory provision that in assessing compensation for severance and injurious affection, the court must take into consideration not only damages actually sustained by the owner but also damages likely to be so sustained at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner: see para 2(d) of the First Schedule to the Land Acquisition Act.

(4) In conclusion, the following orders were made:

(a) In respect of such of the awards made by the Collector which were accepted by the objectors and not referred to court, they are hereby affirmed.
(b) For the loss of the acquired land, the collector's award of $322,272 is increased by 20% to $383,503.96.
(c) For severance and injurious affection, as follows:
  (i) loss of crops to make way for new drains and pond and to make way for an alternative road;
  (ii) cost of new drains;
  (iii) in default of a legally enforceable undertaking in writing by the state government of Penang as aforesaid in terms to be approved by this court, there shall be in favour of the objectors and their successors in title a declaration as to entitlement to reimbursement of all expenses reasonably incurred and properly substantiated for the maintenance (including dredging) of the branch drains concerned so as to ensure a smooth flow of water and waste in the main drains and thus preventing any flooding and damage to crops on the remaining unacquired lands of Bertam Estate. Such expenses shall be recoverable as a debt due and payable and in the event of there being any dispute as regards such claims, then the parties shall be at liberty to apply to court. In the event of the said undertaking being given during the pendency of the appeal from this judgment, then the award of $27,200 for the cost of new drains cannot stand and must be rescinded for otherwise there would be double counting;
  (iv) cost of new fencing for the manager's bungalow;
  (v) cost of new fencing for the rest of the estate – 640 chains of barbed wire fencing on timber posts at $21.45 per chain;
  (vi) cost of alternative road.
(d) Interest at the rate of 8% pa on the sum awarded which is in excess of that awarded by the Collector at the inquiry for the period from the date of possession being taken of the acquired land, namely, 21 February 1980 to the date of payment.
(e) Reimbursement of premia paid by the objectors for insurance for fire hazard, wind storm, personal accident/hospitalization, maintenance for weeding and rat bait/root disease and road licensing of estate vehicles.
(f) Refund of deposit paid by objectors.
(g) Reimbursement of fees paid to valuer and engineer always provided they have been reasonably incurred and properly substantiated.
(h) Costs of these proceedings.

[*Editorial Note*: The collector of Land Revenue has appealed to the Supreme Court vide Civil Appeal No 427 of 1988.]

Cases referred to

1 *Harish Chundar Neogy* v *Secretary of State* 11 CWN 876 (refd)
2 *Ng Tiou Hong* v *CLR Gombak* [1984] 2 MLJ 35 (refd)
3 *Bertam Consolidated Rubber Co Ltd* v *CLR Butterworth* [1984] 1 MLJ 164 (refd)
4 *Collector of Land Revenue, Kuantan* v *Noor Chahaya bte Abdul Majid* [1979] 1 MLJ 180 (refd)
5 *Carl-Zeiss-Stiftung* v *Rayner & Keeler Ltd (No 2)* [1966] 2 All ER 536 HL 564 (refd)
6 *New Brunswick Rail Co* v *British & French Trust Corp Ltd* [1939] AC 1 (refd)
7 *Henderson* v *Henderson* (1843) 3 Hare 100; 67 ER 313 (refd)
8 *Philips* v *Bury* (1694) Skin 447; 90 ER 198 (refd)
9 *Meyers* v *Casey* (1913) 17 CLR 90 (refd)
10 *Maori Trustee* v *Ministry of Works* [1959] AC 1 (refd)
11 *Hong Bee Realty Ltd* v *Collector of Land Revenue, Kuala Lumpur* [1972] 1 MLJ 125 (refd)
12 *Consolidated Plantation Bhd* v *PHT Kelang* [1984] 1 MLJ 273 (refd)
13 *Collector of Land Revenue* v *Looi Lam* [1981] 1 MLJ 300 (refd)
14 *Collector of Dinagepore* v *Girja Nath Roy* ILR 25 Cal 346 (refd)
15 *Cowper Essex* v *Acton Local Board* [1889] LR 14 App Cas 153 (refd)
16 *Bonham-Carter* v *Hyde Park Hotel* [1948] WN89; 64 TLR 177 (refd)
17 *Municipal Council, Sydney* v *Troy* AIR 1928 107 (refd)

Legislation referred to

Land Acquisition Act 1960 ss 8, 14(5), 22, 36(1), 37(1), 48, 51(1)(b), First Schedule para 1(2), 1(2)(bb), 2, 2(d), 3
National Land Code 1965 ss 53, 54, 214A
National Land Code (Penang and Malacca) Order 1985 ss 53, 54
Rules of the High Court 1980 O 94 r 2

NG Sivanandan for the objectors.
Mohd Saari bin Yusoff (State Legal Adviser, Penang) for the respondent.

Cur Adv Vult

Edgar Joseph Jr J: This was a reference to court of an award made by the Collector of Land Revenue, Butterworth, under s 36(1) of the Land Acquisition Act 1960 ('the Act') in respect of the compulsory acquisition by the government of the State of Penang of 32.2841 acres of land, being part of oil palm estate land, known as Bertam Estate, the total area of which is approximately 5,000 acres, the property of the objectors. In particular, the estate land is held under Interim Registrar Lot Nos 2014, 2017 and 2018, Grant First Grade, in the District of Seberang Perai Utara, Mukim 6, in area, 2,042.6862, 1,836.3800 and 124.4800 acres, whilst the acquired land is in area 18.9971, 13.0396 and 0.2474 acres respectively. The acquired land is a linear strip about one chain wide running through the estate land in an east-west direction. The location of the estate land is immediately to the east of Kepala Batas Township stretching some four miles to the east from Jalan Bertam which is an extension of Jalan Padang Club. The estate land has a substantial frontage to Jalan Paya Keladi and frontage to the north-south trunks Keretapi Tanah Melayu and is generally accessible from Jalan Bertam which is off Jalan Lahar Babu. The road is metalled up to the Jabatan Pertanian Buildings and the Pusat Kesihatan.

The date of the publication of the declaration under s 8 of the Act that the land concerned was to be compulsorily acquired for purposes of a public road was 13 September 1979 and it is that date, therefore, which is material for purposes of determining its fair market value.

At the inquiry before the Collector held at the Butterworth Land Office on 22 October 1980, the objectors made a claim based upon a valuation made by Williams, Talhar & Wong, chartered valuers, a summary of which is as follows:

Loss in value:		
(i) for land taken	$482,130	
(ii) loss of crop	$ 28,485	$ 510,615
Severance and injurious affection:		
(i) loss of crop	$103,185	
(ii) water pond	$ 32,000	
(iii) new drains	$ 27,200	
(iv) new fencing	$ 18,450	
(v) alternative road	$ 20,640	
(vi) annual sums (insurance etc)	$547,000	$ 748,475
Consequential Loss:		$ 55,000
	Total claim:	$1,314,090

On 17 December 1981 the Collector offered $639,994.05 as full compensation for the land acquired and for severance and injury.

The breakdown of this sum of $639,994.05 was as follows:

(1) for loss of the land acquired:	$322,272
(2) interest at the rate of 6% pa on item (1) to run from date of possession 21 February 1980 to date of payment 17 December 1981	$ 33,838.56
(3) loss of crop	$ 810
(4) cost of water pond amounting to	$ 29,000
(5) cost of new fencing for estate except for manager's bungalow	$ 13,728
(6) cost of annual sums for three guards, road licensing and YP in perp at 12% amounting to	$240,345.49

Except for item (1) the objectors accepted the rest of the items listed above which were not therefore referred to court and are accordingly hereby affirmed.

The objectors did, however, on 25 February 1982 require the Collector to refer for the determination of the court, pursuant to the provisions of s 37(1) of the Act, item (1) above of his award relating to loss of the land acquired, on the ground that they objected to the amount of the compensation specified therein.

At this point, I would interpolate to mention that the Collector had rejected, in toto, the following items of claim (not specified above) made by the valuers for the objectors:

(a) cost of new drains amounting to $27,200;
(b) claim for an undertaking in writing enforceable in law to be given either by the drainage and irrigation department or the state government that it will be responsible for the maintenance (including dredging) of the branch drains covered by the acquisition so as to ensure a smooth flow of water in the main drains, thus preventing any flooding and damage to crops on the remaining unacquired land of Bertam Estate in default of which compensation is to be awarded;
(c) cost of new fencing for manager's bungalow ($4,700);
(d) cost of alternative road ($20,640);
(e) cost of annual sums for insurance premia for insurance against fire hazard, windstorm, personal accident/hospitalization;
(f) cost of maintenance for weeding, rat bait/root disease;
(g) claim for consequential loss, to wit, reimbursement of fees paid to solicitors, chartered valuer and engineer.

The reference to the court under s 36(1) of the Act was duly made by the Collector and his grounds for making the award were as follows:

> I have studied the report of claim submitted by the private valuer CH Williams, Talhar & Wong Sdn Bhd and the report of valuation by the government valuer Mr Clement I Fernandez and I am of the opinion that the valuation by the government valuer at the material date is a fairer and acceptable value.

Before me, broadly and summarily stated, the questions for determination were:

(i) what was the fair market value of the land acquired at the material time?
(ii) what was the appropriate sum to award for injurious affection?
(iii) whether the court should require the state government of Penang or the drainage and irrigation department to give the undertaking aforesaid or, in default, what is the appropriate compensation to award or appropriate order to make in lieu of the undertaking?
(iv) what is the appropriate sum to award for consequential loss?
(v) what other reliefs (if any) should be awarded in favour of the objectors?

The principles relating to the determination of compensation are spelt out in the First Schedule to the Act.

Under s 1(2) of the First Schedule 'market value' shall be deemed not to exceed the price which a bona fide purchaser might reasonably be expected to pay for the land:

(a) on the basis of its existing use; or
(b) on the basis of the anticipated continued use of the land for the purpose designated in any development plan prepared under any written law relating to planning by the appropriate authority, whichever is the lower, after taking into account:
  (aa) the zoning and density requirement and any other restrictions imposed under any written law relating to planning; and
  (bb) any express or implied condition of title restricting the use to which the land may be put, and no account shall be taken of any potential value of the land for any other more intensive or more valuable use.

In determining the amount of compensation payable, the court is expressly required by ss 2 and 3 of the First Schedule to take into consideration certain matters whilst disregarding others.

In my approach to the question: what is the fair market value for the land acquired as at the material date, I have accordingly kept in the forefront of my mind the principles laid down in the First Schedule to the Act.

It is well settled that the three recognized methods of valuation of land compulsorily acquired under acquisition legislation are these:

(a) the opinions of expert valuers;
(b) the price paid, within a reasonable time, in bona fide transactions of purchases of the land acquired, or of the lands adjacent to the land acquired and possessing similar advantages; and
(c) a certain number of years' purchase of the actual or immediately prospective profit from the lands acquired. If authority is needed, I would refer to *Harish Chundar Neogy* v *Secretary of State*.[1]

I have two general observations to make regarding the methods of valuation aforesaid.

First of all, the most reliable guide in determining fair market value is, of course, evidence of sale of the same or similar land in the neighbourhood, due allowance having been made for the particular circumstances of each case. Secondly, as to the evidence of experts, I can do no better than refer to and adopt the view expressed in *Harish Chundar's* case[1] at p 877, namely, that their 'estimates are undoubtedly some evidence but their value is not great, as expert evidence is liable to err, unless it is supported by or coincides with other evidence'.

I must now turn to consider the particular circumstances of the present reference.

It is convenient if, at the outset, I refer to the divergence of opinion between the rival experts called by the parties, that is to say, Mr Loh Soong Chiew for the objectors and Mr Clement Fernandez for the collector.

Mr Loh, in giving his evidence of the fair market value of the land acquired, relied primarily on evidence of sales of two plots of lands which he considered were comparable to the acquired land. Particulars of these two plots are described at items 11 and 13 of his report AB 1 p 31 as follows:

(11) Part 1470 (formerly 1243)	441,543 sq ft	$552,000	$1.25 psf Agreement sale to Kepala Batas Development Sdn Bhd (WTW value made 22 September 1977)
(13) Part 1999	7,626 sq ft	$ 22,878	$3 psf Agreement 19 January 1979 (purchase by estate)

Relying on the evidence of the two comparable sales aforesaid as a guide and, after making certain adjustments, Mr Loh expressed the opinion that the fair market value of the land acquired as at the relevant date, that is to say, 13 September 1979, would be approximately $15,000 per acre.

On the other hand, Mr Fernandez was of the opinion that there was no evidence of suitable comparable sales in the neighbourhood to serve as a basis for valuing the subject land. In particular, he did not think it right to

use selling prices of small lots, as Mr Loh had done, as a yardstick for purposes of the present case. In this, he appears to be supported by the case of *Ng Tiou Hong* v *CLR Gombak*.[2] He therefore proceeded, first of all, to zone the acquired land into three belts or strips, to wit, zones A, B and C to reflect its distance from the town of Kepala Batas and its varying degrees of prospective development thus:

Zone A: First 80 chains length (Part Lot 2014) (eight acres)
Zone B: Next 80 chains length (Part Lot 2014) (eight acres)
Zone C: Balance 164 chains length (Part Lots 2014, 2017, 2018) (16.4 acres)

Mr Fernandez went on to explain that using a base value for zone C of $8,000 per acre, he added more or less 10% to that value for the purpose of assessing the value of zone B at $9,000 per acre and, by the same process, he added 80% for the purpose of assessing the value of zone A at $15,000 per acre.

Mr Fernandez further explained that in arriving at his base value of $8,000 per acre he relied on evidence of awards made and accepted, sufficiently proximate in point of time to the relevant date for purposes of the present valuation. There is authority for saying that such a method of valuation may be accepted: see *Bertam Consolidated Rubber Co Ltd* v *CLR Butterworth*.[3]

By the above process he arrived at the following valuation in respect of the acquired land, namely:

Zone A:	Part Lot 2014 (8 acres x $15,000 per acre)	$120,000
Zone B:	Part Lot 2014 (8 acres x $9,000 per acre)	$ 72,000
Zone C:	Part Lot 2014 (2,9971 acres x $8,000 per acre)	$ 23,976
	Part Lot 2017 ($13,0396 acres x $8,000 per acre)	$104,316.80
	Part Lot 2018 (0.2474 acres x $8,000 per acre)	$ 1,979.20
		322,272.00

He stressed that in making his valuation he did take into consideration the potentialities of the land acquired and on that basis, had valued Bertam Estate as a whole at $10,000 per acre. He added that had he valued the acquired land as agricultural land only, he would have done so at a figure of $5,000 per acre.

Commenting on the lands the subject of the above awards, he remarked that both lands concerned were subject to the constraints imposed by s 214A of the National Land Code ('the Code') and had been recommended for agricultural use by the Planning Authority. As these considerations also applied to the land acquired in the present case he considered the awards an acceptable yardstick. Accordingly, he proceeded to value the acquired land as follows:

Zone A:	Part Lot 2014 (8 acres x $15,000 per acre)	$120,000
Zone B:	Part Lot 2014 (8 acres x $9,000 per acre)	$ 72,000
Zone C:	Part Lot 2014 (2,9971 acres x $8,000 per acre)	$ 23,976
	Part Lot 2017 (13,0396 acres x $8,000 per acre)	$104,316.80
	Part Lot 2010 (0.2474 acres x $8,000 per acre)	$ 1,979.20
	Compensation for land taken	$322,272.00

I hasten to add, however, that under cross-examination, Mr Fernandez was careful to say that in resorting to the belting principle (not in the strict sense described in *Aggarawalla on Land Acquisition*) for purposes of valuation, he had merely done so, not as a method of valuation but merely to fortify his base valuation which was founded on comparable awards made and accepted.

I regret I find that the two plots of land, to which reference has been made by Mr Loh, do not bear comparison to the acquired land.

I shall take first, the land referred to at item 11 of his report hereinbefore reproduced.

In the first place, it is adjacent to a commercial plot. In the second place, the purchaser thereof was Kepala Batas Development Sdn Bhd, a subsidiary of the objectors' company and, as such, this cannot be said to be a transaction at arm's length.

Counsel for the objectors suggested that the fact that the transaction was not at arm's length told in favour of the objectors for this would mean that the value of the plot has been more than the price stated in the transfer. I am afraid, in the absence of evidence, I am not prepared to draw that inference. I shall just content myself by saying that the transaction not being at arm's length, no reliance can be placed upon it for purposes of assessing the fair market value of the acquired land.

I shall next take the plot referred to at item 13 of Mr Loh's report hereinbefore reproduced. This sub-divided building plot, although about a quarter mile from the acquired land, is in fact located in Kepala Batas town and was purchased by the objectors on 19 January 1979 at $3 per sq ft. It was clearly town land and the fact that its price was stated to be $3 per sq ft reinforces that fact. Moreover, it formed part of a parent plot which was not subject to the constraints imposed by s 214A of the Code. In the case of this plot, too, I am not prepared to place any reliance on it for purposes of assessing the fair market value of the acquired land.

At this point, I should like to refer to an issue which arose concerning applicability or otherwise of the provisions of s 214A of the Code to the acquired land. The learned state legal adviser contended that it did whilst learned counsel for the objectors contended it did not.

Now s 214A of the Code provides as follows:

214A(1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board, (hereinafter referred to as 'the Board') established under subsection (3).

(2) The Registrar shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.

(3) For the purpose of this section there shall be established an Estate Land Board consisting of –

(a) the State Secretary, who shall be the Chairman; and

(b) not more than four members appointed by the State Authority from amongst members of the Public Service.

(4) The proprietor or any co-proprietor of any estate land desiring to transfer, convey or dispose of in any manner whatsoever such land to two or more persons shall together with such persons jointly submit an application to the Board in Form 13C.

(5) The Board may approve an application made under subsection (4) and shall have power to refuse or cancel an approval of such application if –

(a) it is satisfied that any statement or representation made in the application is false or incorrect; or

(b) it is satisfied that the applicant fails or refused to comply with any direction given or restrictions or conditions imposed by it; or

(c) it appears to it that the approval of the application will not be in the public interest.

(6) Decision of the Board shall be by majority of votes; and in the case of equality of votes the Chairman shall have a casting vote.

(7) Before making any decision the Board may as it thinks fit call any person to give any statement before it or produce any document to be examined by it.

(8) Where approval of an application under subsection (4) is refused or cancelled by the Board, the applicant may, within 30 days after the communication to him of the Board's decision of such refusal or cancellation, appeal in writing to the State Authority.

(9) The State Authority may confirm or reverse the decision of the Board:

Provided that where the decision of the Board is reversed by the State Authority, the State Authority may give such direction or impose such restriction or condition as it may think fit.

(10) Any person who obtains or attempts to obtain approval of the Board by knowingly making or producing or causing to be made or produced any false or fraudulent declaration, certificate, application or representation, whether in writing or otherwise or who fails or refuses to comply with any direction, restriction or condition imposed on him shall be guilty of an offence and shall on conviction be liable to a fine not exceeding $10,000 and where the offence is a continuing one shall be further liable to a fine not exceeding $1,000 in respect of each day the offence is committed.

(10A) (a) Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of subsection (1), shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than one year and not more than three years and to a fine not exceeding ten thousand ringgit.

(b) For the purposes of this subsection the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board, shall be conclusive proof that the estate land is conveyed or disposed of in contravention of subsection (1); and any act to demarcate an estate land or to cause or permit the demarcation of an estate land otherwise than in accordance with the provisions of this Act shall be prima facie proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of subsection (1).

(11) For the purpose of this section 'estate land' means any agricultural land held under one or more than one title the area or the aggregate area of which is not less than 40 hectares and the lots constituting such area are contiguous.

(12) For the purpose of this section, the said lots shall be taken to be contiguous if they are separated from each other only by such land as is used, required or reserved for roads, railways or waterways.

It would appear that the object of s 214A is to deter fragmentation of land which often has the effect of dislocating the labour force on estates. But, what is important in the context of the present case is that if it applied to the acquired land then, in assessing the fair market value, the constraints imposed by it would have to be taken into account by the court because para 1(2) of the First Schedule to the Act, specifically provides that: 'In assessing the market value the effect of any express or implied condition of title restricting the use to which the scheduled land may be put shall be taken into account'. Failure to observe this statutory principle would be a misdirection in law: see, for example, *Collector of Land Revenue, Kuantan* v *Noor Chahaya bte Abdul Majid*.[4]

In the case of *Bertam Consolidated Rubber Co Ltd* v *CLR Butterworth*,[3] the parties to which were the same as in the present case, the subject matter of the acquisition being another portion of Bertam Estate, in area 20 acres, the Federal Court had to consider the question whether the judge in the court below was wrong in taking into account the constraint imposed by s 214A when determining the market value. Azmi FJ (as he then was) speaking for the Federal Court, had this to say at p 71, col 2 para 7:

> It is also contended on behalf of the appellants that it was wrong for the learned judge to take into account the constraint imposed by s 214A of the National Land Code ('NLC') in determining the market value. Section 214A has the effect of prohibiting any transfer, conveyance or disposal

in any manner of estate land unless approval is obtained first from the Estate Land Board. The object of this section is to prevent fragmentation of estate land like Bertam Estate without due consideration being given to social and economic consequences to the country. Although the constraint could be removed by application to the Estate Land Board, at the material date, the subject land was not free from that legal as opposed to administrative constraint. As such the learned judge was not wrong in law in taking it into consideration. Indeed, in examination-in-chief, Mr Loh testified that in arriving at his valuation he gave 20% deduction for the effect of s 214A of the NLC.

Before me, counsel for the objectors had argued that both the trial judge and the Federal Court were wrong in holding that the constraint imposed by s 214A applied in that case as the acquired land was not agricultural land and the title under which they were held were grants first grade in perpetuity. That being so, it was contended that ss 53 and 54 of the National Land Code (Penang and Malacca) Order 1965, applied to prevent the acquired land from being subjected to any conditions whether express or implied, restraining its use to agricultural or any other purpose.

On this basis, I had been invited by counsel to hold that in the present case, for the reasons stated, the constraints imposed by s 214A did not apply to the acquired land.

Now, the rule of estoppel by res judicata is that where a final judicial decision has been pronounced by a court of competent jurisdiction over the parties to, and the subject matter of litigation, any party or privy to such litigation, as against any other party or privy thereto, and in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits: see Lord Guest in *Carl-Zeiss-Stiftung* v *Rayner & Keeler Ltd (No 2)*.[5]

Similarly, in *New Brunswick Rail Co* v *British & French Trust Corpn Ltd*,[6] Lord Maugham LC said this at pp 19-20:

> The doctrine of estoppel (per rem judicatam) is founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

There is another principle of res judicata which must not be forgotten and it is this: whenever it is shown that the party against whom the judicial decision is pronounced omitted to raise by pleadings, argument, evidence, or otherwise some question or issue or point which he could have raised by way of defence or support to his case, the adverse decision, though it contains no express declaration to that effect, is deemed to carry with it a particular adverse decision on the question, issue or point so omitted to be raised, just as much as if it had been expressly determined against him. It makes no difference that the question or issue is simply passed over through inadvertence, or is made the subject of express or implied admission.

So, for example, in *Henderson* v *Henderson*,[7] Sir James Wigram said this:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their own case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Moreover, it is neither essential nor even pertinent to demonstrate that the decision relied upon as constituting an estoppel is itself correct or well founded in law or fact. So long as the decision is a final judicial decision, by a court of competent jurisdiction, on the same question, and as between the same parties or their privies, it will be conclusively deemed correct, unless and until upset on appeal. The principle underlying this proposition is that a competent tribunal has jurisdiction to decide wrongly as well as rightly (per Lord Holt CJ in *Philips* v *Bury*[8]) and if it makes a mistake, that mistake is conclusive as between the parties unless and until reversed on appeal: per Isaacs J in *Meyers* v *Casey*.[9] I would, therefore, hold that the objectors in the present case are barred by res judicata or issue estoppel from contending that the acquired land is not subject to the restrictions imposed by s 214A of the Code.

In the circumstances, in my approach to the question what is the fair market value of the land as at the material date, I have to take it that the acquired land is subject to the restrictions imposed by s 214A of the Code. Accordingly, I am enjoined by para 1(2)(bb) of the First Schedule to the Act to take into account 'any express or implied condition of title restricting the use to which the scheduled land may be put ...'. Not to do so is a misdirection as pointed out in the Federal Court case of *Collector of Land Revenue, Kuantan* v *Noor Chahaya bte Abdul Majid*.[4]

I must now evaluate the testimony of Mr Fernandez to which I have referred. I consider he was quite right in concluding that there being no evidence of sales of the same or similar land in the neighbourhood at or about the material time, he was entitled to rely on evidence of the previous awards hereinbefore mentioned: see *Bertam Consolidated Rubber Co Ltd* v *CLR Butterworth*.[3] Similar-

ly, since this acquisition involved a partial taking of land with no separate title, he was also right in first valuing the estate as a whole in order to arrive at a base figure. Such an approach is supported by the following passage in the judgment of the House of Lords in *Maori Trustee* v *Ministry of Works*:[10]

> To give a claimant compensation on the basis that there were subdivisions of the land, when, in fact, there were not, would be to give him compensation for unrealized possibilities as if they were realized possibilities.

That was also the approach adopted by Abdul Hamid J (as he then was) in *Hong Bee Realty Ltd* v *Collector of Land Revenue, Kuala Lumpur*.[11] Furthermore, I consider that Mr Fernandez was also right in parcelling the acquired land into three zones, namely, zones A, B and C; zone A being allocated the most value on account of its proximity to Kepala Batas town with zones B and C being allocated lesser values having regard to their location, being correspondingly further away from Kepala Batas town.

Amplifying this part of his evidence, Mr Fernandez said, when speaking about the market value of Bertam Estate as a whole:

> I say its development potential varies from slight to moderate. This is because Bertam Estate extends from Kepala Batas to four miles to the interior. So parts nearest the township will have better development potential than those parts lying to the interior.

Under cross-examination, Mr Fernandez testified that in making his valuation he had taken into consideration the draft town plan of Kepala Batas town but had concluded that it did not apply, which I take it meant he did not consider it relevant, because the acquired land fell outside the area comprised in the draft town plan. He further testified that any land not included in a draft town plan would be land recommended for agricultural use by the planning authority as a matter of planning policy. However, Mr Fernandez's reliance upon the previous awards aforesaid was challenged in cross-examination on the ground that they related to lands vastly inferior to the acquired land having regard to differences in location and potentialities. In reply, Mr Fernandez conceded that those lands were inferior but not vastly inferior to the acquired land because Malakoff Estate was close to Tasek Glugor which he presumed was a town though it had been gazetted as a village by virtue of GN 34/21.1.54 and GN 35/17.4.58.

I must also refer to another part of the cross-examination of Mr Fernandez and it is this: he was asked whether it was true that in the *Butterworth* case[3] where the subject matter of the acquisition was Lot 2014, the High Court had enhanced his valuation, upon which the Collector of Land Revenue had relied, from $12,600 per acre to $15,000 per acre, and that this represented a 20% increase, to which question, he could, of course, only answer in the affirmative, since this is patently clear from a perusal of the judgment of the Federal Court. Accordingly, Mr Fernandez was constrained to concede that in the present case too there had to be a corresponding increase in the award made in respect of loss of the land acquired from $322,272 to $383,503.96.

Having given the fullest consideration to the oral evidence of the rival experts and their respective reports, I would express my preference for the opinion expressed by Mr Fernandez in view of the reasons given by him in support thereof. However, in view of Mr Fernandez's concession aforesaid, the Collector's award in respect of loss of the land acquired should be increased by 20%, that is to say, from $322,272 to $383,503.96 and I so order.

I shall now pass on to consider the remaining claims made on behalf of the objectors.

As regards severance and injurious affection, the objectors made five separate claims, namely:

(a) loss of crops to make way for new drains, pond and alternative road	$102,375
(b) cost of new drains	$ 27,200
(c) claim for damages sustained by reason of the acquisition injuriously affecting the other unacquired property of the objectors being the difference between the sum awarded for the land acquired and the cost to the objectors of providing themselves with other land to be used in like manner to that in which the land acquired was used, plus the cost of adapting it to such use. Alternatively, a clear and enforceable undertaking in writing by the drainage and irrigation department or the state government of Penang that it will be responsible for the maintenance of the branch drains concerned so as to ensure a smooth flow to the main drains thus preventing any flooding and damage to the crops on the remaining unacquired lands of Bertam Estate	
(d) cost of new fencing for the manager's bungalow	$ 4,700
(e) cost of alternative road	$ 20,640
(f) insurance, for fire hazard and wind storm, personal accident/hospitalization, maintenance for weeding and rat bait/root disease	$306,654.51
	$461,569.51

Before I embark upon a consideration of the separate claims aforesaid, I must make the preliminary observation that there is explicit statutory provision that in assessing compensation for severance and injurious affection, the court must take into consideration not only damages actually sustained by the owner but also damages likely to be so sustained at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his other property, whether movable or immovable, in any other manner: see para 2(d) of the First Schedule to the Act.

It is not difficult to cite a plethora of cases illustrating the way in which the courts have applied this provision and so it will suffice if I cite some of these.

In *Consolidated Plantation Bhd* v *PHT, Kelang*,[12] the objectors had alleged injurious affection to their other land; to wit, partial loss of water supply to their mill by reason of the Selangor state government acquiring part of their land for a housing scheme. The Federal Court upheld an award by the trial judge representing the cost of turfing the acquired land as such a measure would prevent the apprehended loss of their water supply.

In *Collector of Land Revenue* v *Looi Lam*,[13] also a Federal Court case, the objector's land was acquired for purposes of deviating the course of the Sungei Benus which passed through Kg Bahru. As a result of the river deviation work the house belonging to the objector was badly damaged and required extensive repair. It was held that damages for injurious affection to the house could be claimed and was rightly awarded under para 2(d) of the First Schedule to the Act.

In *Collector of Dinagepore* v *Girja Nath Roy*[14] the Maharajah of Dinagepore owned a piece of land which was acquired for the construction of a bridge which was in fact constructed for traffic and, as a result, the Maharajah claimed compensation for loss of income derived from his ferry which had thus been replaced by the bridge relying on cl 4 of sub-s (1) of s 23 of the Indian Land Acquisition Act, which was generally in pari materia with para 2(d) of the First Schedule to our Act.

The Maharajah's claim succeeded, the Calcutta court citing with approval the following passage in the judgment of Lord Watson in *Cowper Essex* v *Acton Local Board*:[15]

> A proprietor is entitled to compensation for depreciation of the value of his other lands in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers.

The court also said, inter alia, at p 352:

> There is no limit as to the nature of the 'injurious affecting' except in so far as this is provided for by the other clause of the section: the difficulty is as to the time when the damage is sustained.
>
> The words 'at the time when the Collector takes possession of the land' cannot mean that compensation can only be given for the damage which had actually at that time been sustained without reference to a continuing damage caused by the acquisition.

In *Collector of Land Revenue* v *Looi Lam*,[13] Suffian LP cited with approval *Girja Nath Roy's* case[14] and at p 301 col 2, made the observation:

> Be it noted that our provision is stronger than the Indian, for ours provides that not only must regard be had to the damage actually sustained by the owner but also damage likely to be sustained.

Similarly, the same point was made by the Federal Court in the case of *Consolidated Plantations Bhd* v *PHT Kelang*.[12]

Turning to the particular circumstances of the present case, I shall first of all deal with the claim for loss of crops to make way for new drains, pond and alternative road, amounting in all to $102,375, full particulars whereof appear sufficiently in the report of the objectors' expert, being exh AB1.

In *Cripps on Compulsory Acquisition*, 11th Ed, p 916, there appears the following passage:

> Where, however, the land has potentialities beyond its present use which can only be realized by his giving up possession for exploitation by the purchaser, and the owner is entitled to the value of these potentialities, the land has two values to him, (i) the existing use value and a right to compensation for disturbance, and (ii) the potential value; and he is entitled to whichever is the higher.

The above passage from *Cripps* commended itself to Abdul Hamid J (as he then was) in *Hong Bee Realty Ltd* v *Collector of Land Revenue, Kuala Lumpur*.[11]

I must next address my mind to the question: are the claims for loss of crops in this case allowable? The question is answered for me in the case of *Bertam Consolidated Rubber Co Ltd* v *CLR Butterworth*[3] wherein the parties were the same as in the present case and the subject matter of the acquisition was another portion, also of Bertam Estate, to which I have made reference in the opening paragraph of this judgment.

In that case, Azmi FJ (as he then was) speaking for the Federal Court, said this at p 70, col 1, para 3:

> On the other hand, Mr Loh for the appellant made separate valuation for the scheduled land and its oil palm. In his opinion, for each acre $16,000 should be the market value for the land and $6,500 for the crop. The learned judge did not find any difficulty in rejecting this double accounting method of valuation. We agree that when the scheduled land is valued on the basis of agricultural land with its development potential added, separate valuation should not be made for its crops in determining market value of the acquired land.

This view of the Federal Court upon a point of law which arose in previous litigation between the same parties,

bars the objectors, by reason of res judicata, from re-agitating the same point in this case. Accordingly, I have no discretion in the matter, and must dismiss the claim for loss of crops on the ground that it amounts to double counting.

I must next consider the claim for cost of new drains and damages consequential on the construction thereof. The objectors claim $27,200 for cost of new drains made up as follows:

(a) 640 chains required at $30 per chain	$19,200
(b) Bridging: four at $2,000 each	$ 8,000

It is true that under cross-examination, Mr Fernandez had conceded that the claims for injurious affection in respect of drains were not too remote and had to be claimed now. However, he did make the point in his report that there was no indication or plan as to where these drains are to be built and how this loss was calculated.

The claim regarding this part of the objectors' case, so far as the calculations were concerned, were never really challenged in cross-examination when Mr Ong Tatt Liew (PW1), the chairman and director of the objectors and a registered appraiser with over 25 years' experience in the plantation industry, gave evidence and I do not in any way consider them unreasonable. I would allow both the claims for cost of new drains, namely, 640 chains at $30 per chain amounting to $19,200 and four bridges at $2,000 each amounting to $8,000.

I must next consider a claim relating to the drainage system in Bertam Estate. By way of introduction, Mr Ong stated that branch drains or feeder drains (being drains five to eight ft in depth and five to eight ft in width or more) are of vital importance to the drainage system on the estate. Explaining the reasons for this he said: water from the branch drains flowed into the main drains (the leader drains) and from there into the sea. Naturally, this leads to the branch drains being silted up and so they would need to be dredged periodically at least once a year. Moreover, if ordinary drains are constructed in place of branch drains, there would, he said, be extensive flooding considering that Bertam Estate land is relatively flat.

Touching on the effects of flooding, Mr Ong said that once there is flooding, workers would be denied access to their work sites and Bertam Estate, being fully cultivated with rubber and palm oil trees, would incur losses which could run into millions. Furthermore, other surrounding estates, like Malakoff Estate, could be similarly affected. Having regard to these considerations, Mr Ong went on to explain that adequate drainage is so important to the estates concerned that the government formed a Bertam Drainage Board more than 30 years ago (of which he was a member) but with jurisdiction only over main drains; it being the responsibility of the estates to maintain branch drains and tertiary drains (field drains). It was common ground that the acquisition herein covered the branch drains on either side of the laterite road on Bertam Estate so that the objectors have lost control over them. Also, Mr Fernandez himself had testified that branch drains (feeder drains) serve as a water catchment area and that in 1985 there had been flooding within Kepala Batas and that because Bertam Estate lies in a flood-prone area earth drains had been dug. But Mr Fernandez went on to confirm that the maintenance of the branch drains was the responsibility of the landowners and that in the event of flooding in Bertam Estate, the drainage and irrigation department would not be concerned with the condition of the branch drains. Emphasizing the point, Mr Fernandez further stated that the plans of the network of drains maintained by the drainage and irrigation department did not reflect the branch drains (feeder drains) on Bertam Estate. Clearly, therefore, the drainage and irrigation department have not considered it their responsibility to maintain these branch drains.

It was submitted by the learned state legal adviser that everything possible had been done by the Jabatan Kerja Raya to carry out accommodation or, in other words, reinstatement works on the acquired land which included digging new earth drains to replace existing earth drains affected by realignment of the road, constructing a new brick wall to replace the existing brick wall next to the manager's bungalow and constructing a retaining wall for the pond. Accordingly, it was submitted that there was no evidence to suggest that the objectors' land had sustained or was likely to sustain damage. At best, it was urged that the objectors' claim was speculative and so should be dismissed.

Upon the evidence before me, I am satisfied that the objectors' claim arising from damage likely to be sustained by reason of the acquisition injuriously affecting their other property, in particular, the risk of damage to crops arising from flooding caused by silting up of branch drains, is a very real one and goes beyond the realm of speculation. It follows that I accept the evidence of Mr Ong regarding this part of the case. He has been intimately connected with Bertam Estate and, as a member of Bertam Drainage Board, he was fully conversant with the problem of drainage, the risk of flooding and the consequences thereof. I also found nothing improbable in his evidence and, indeed, it was virtually uncontradicted.

The question which arises here is what is the appropriate remedy to award to the objectors. During the cross-examination of Mr Phuah Kian Ghee (DW1), the drainage and irrigation officer attached to the drainage and irrigation department, Seberang Perai, by counsel for the objectors, the following evidence emerged:

Q: Is your department prepared to give a clear and enforceable undertaking in writing that it would be responsible for the maintenance of the branch drains concerned, so as to ensure a smooth flow to the main drains thus preventing any flooding and damage to crops on the remaining unacquired lands of Bertam Estate?

A: Yes, subject to one qualification; substitute the word 'alleviating' for 'preventing'.

Counsel for the objectors has said that if a legally enforceable undertaking in writing was given either by the state government of Penang or drainage and irrigation department in terms of the undertaking spoken of by Mr Phuah, his clients would drop this part of the claim. Unfortunately, however, the state legal adviser could not say if such an undertaking would be given.

According to *Lawrence and Moore on Compulsory Purchase and Compensation*, pp 106-107, in some cases, claims for injurious affection and damage may be reduced by reason of an undertaking by the acquiring authority to carry out certain 'accommodation works' on the land taken. But, I do not consider that I have the power to require the state government or the drainage and irrigation department to give such an undertaking as is sought by the objectors. Nor, for that matter, am I in a position to assess compensation as the apprehended damage arising from flooding is merely prospective. In this connection I do not consider the analogy of claims for damages for loss of future earnings in personal or fatal injury cases helpful as in such cases one always has some material upon which to assess the damages. Yet, the maxim is ubi jus ibi remedium (there is no wrong without a remedy). Moreover, whatever remedy to be awarded must be awarded here and now and not in other proceedings.

Accordingly, in default of a legally enforceable undertaking in writing by the state government of Penang, in terms to be approved by this court, then I consider that justice will be done if, in the exercise of my inherent jurisdiction under O 92 r 2 of the Rules of the High Court 1980, I grant the objectors and their successors in title, which I hereby do, a declaration as to entitlement to reimbursement from the state government of Penang, of all expenses reasonably incurred and properly substantiated for the maintenance (including dredging) of the branch drains concerned so as to ensure a smooth flow of water and waste in the main drains and thus preventing any flooding and damage to crops on the remaining unacquired lands of Bertam Estate. Such expenses shall be recoverable as a debt due and payable and in the event of there being any dispute as regards such claims then the parties shall be at liberty to apply to court. For the avoidance of doubt, I would add that in the event of the said undertaking being given during the pendency of the appeal from this judgment, then the award of $27,200 for cost of new drains cannot stand and must be rescinded for otherwise this would amount to double counting.

I must next consider the claim for cost of new fencing in respect of the manager's bungalow for $4,700 (470 ft, six ft high at $10 per ft run). It was contended, and I agree, that as a result of the construction of the new drains, the old fencing had to be removed and new fencing constructed in lieu thereof. I also do not consider the amount claimed under this head unreasonable and, as in the case of the claim for cost of new drains, Mr Ong Tatt Liew was never challenged in cross-examination on this point. I would therefore allow the claim for cost of new fencing for the manager's bungalow at $4,700 and for the rest of the estate at $13,728.

I must next consider the claim for cost of alternative road. In examination-in-chief, Mr Ong had testified that the objectors needed an alternative laterite road mainly for its workers to move freely from one end of the estate to another. Under cross-examination, he admitted that the result of the acquisition would not, however, prevent Bertam Estate from using the existing road though it would be a public road. However, when it was put to him that the construction of an alternative road by the side of the existing laterite would be a luxury and not a necessity, he disagreed and made the point that an alternative road was necessary for the safety of the workers. I regret I find this claim not allowable. The effect of the acquisition has been to improve the existing road by increasing its width by some 30 ft, a road to which the objectors have free access. The risk of injury to workers who may use this road has, I consider, been exaggerated. I therefore accept tthe submission of the state legal adviser that to admit this part of the objectors' claim would be to allow a claim for a luxury.

I must next consider claims for cost of annual sums for insurance for fire hazard and wind storm, personal accident/hospitalization, and claims for cost of maintenance for weeding and rat bait/root disease. In his report (AB1 pp 8-9), the objectors' expert had this to say in regard to this branch of the claims:

> As this government acquisition will provide a public road through which all members of the public are allowed to pass, additional expenditure will be incurred by the estate to allow for the following:
>
> (a) security fencing along both sides of the road to prevent destruction of crops by straying animals and to prevent theft. This includes the new fence six ft high for the manager's bungalow;
> (b) additional round of spraying (weeding) to keep clean the ground conditions of the area immediately by the road side, now affected by wind blown weeds etc;
> (c) the trees are now more susceptible to root disease and attack by rats which can now hide in open ground;
> (d) additional risk of fire caused by careless users of the road and additional premium has to be paid for;

(e) additional risk of wind storm damage now that trees along the road are exposed and higher premiums are now payable;

(f) exposure of workers to risks of life now that they are required to cross public roads for work or on returning from work.

In my view, these claims even if not too remote, as urged by Mr Fernandez, were not properly substantiated. No authorized representative of the objector company, having the requisite personal knowledge, gave evidence that these expenses would be incurred and, if so, whether it would be reasonably incurred. Nor was any proper evidence led as to costing with regard to the items of damages claimed. It is axiomatic that a court is entitled to the best evidence. In these circumstances, I am reminded of what Lord Goddard said in *Bonham-Carter* v *Hyde Park Hotel*,[16] namely:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying, 'this is what I have lost; I ask you to give me these damages'.

It follows, then, that it would be wrong for me to make an award under this head, especially since the sum claimed are substantial and of a recurring nature, on the mere say so of the objectors' expert. Accordingly, this branch of the objectors' claims must be refused.

Next, I must consider the claims for recoupment of fees paid by the objectors to their valuer, solicitors and engineer which Mr Fernandez had himself conceded, could be allowed by the court in the exercise of its discretion under s 14(5) of the Act.

In *Consolidated Plantation Bhd* v *PHT Kelang*[12] the Federal Court upheld the order of the High Court allowing a claim for survey fees at 1% of the value of the subject land. The approved scale fees prescribed by the Board of Valuers, Appraisers and Estate Agents under the Valuers, Appraisers and Estate Agents Act 1981 provides, inter alia, for fees at the rate of 1% on the first $100,000 and at the rate of ⅖% on the residue up to $2m. I would, accordingly, applying this scale, allow the claim for recoupment of the fees paid by the objectors to the valuer.

I can see no distinction in principle between a claim for recoupment of fees paid to a valuer and that paid to an engineer. In my view, therefore, the objectors are entitled to recoupment of fees paid to the engineer subject to their being in accordance with any relevant scale or, if based on quantum meruit, then subject to their being reasonable.

However, so far as the claim for recoupment of fees paid by the objectors to their solicitors is concerned, I would refuse the same since the party and party costs of the proceedings both here and before the Collector are in the character of an indemnity and would be payable to the objectors and not to their solicitors, provided always that if the fees paid are less than such costs, then the solicitors would be entitled to keep the difference.

The remaining issues in this reference relate to the questions of interest and costs and may be dealt with shortly. As to interest, on the date when the Collector entered into possession of the land, that is to say on 21 February 1980, the rate of interest payable on compensation awarded by the court in excess of that awarded by the Collector was 6% pa but on 20 January 1984 a new rate of interest of 8% pa was prescribed by the Land Acquisition (Amendment) Act (A 575/1984) which amended s 48 of the Land Acquisition Act 1960 to read as follows:

> If the sum which in the opinion of the Court the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of 8% pa from the date on which the Collector took possession of the land to the date of payment of such excess to the Court or to the person interested.

The question which therefore arises for decision is whether the old rate or the new rate of interest applies to the increase in the award I have made.

In my opinion, the wording of s 48 in the amended form that it now takes is patently clear, and applies whenever an award is made by the court on or after the date it came into effect even though the Collector had entered into possession of land for purposes of s 22 of the Act before that date. I am fortified in my view by the decision of the Privy Council in *Municipal Council, Sydney* v *Troy*.[17] In that case the appellants acquired a piece of land on 6 June 1924. The rate of interest payable on compensation then was 4%. On 17 September 1924, a new rate of interest at 6% was prescribed. On the question of the applicability of the new rate, it was held that the amendment did not give rise to any question of retrospective operation. On 17 September 1924, the new standard rate of interest was declared to be applicable to the compensation for all land acquired. Their Lordships thought that these words were unambiguous. They gave a title to the higher rate of interest as from 17 September, and applied subsequently to the passing of the Act which contained this fresh provision as to compensation for land acquired prior thereto, notwithstanding that the Act was assented to later.

As to the claim for costs, the Act by s 51(1)(b) provides:

> where the amount of the Court award exceeds the sum awarded by the Collector, the costs shall ordinarily be paid by the Collector, but if the Court is of opinion that the claim of the applicant was so excessive or that he was so negligent in putting his case before the Collector that some deduction

from his costs should be made, or that he should pay a part of the Collector's costs, the Court may at its discretion make such order as to costs as it may think fit.

In the exercise of my discretion I therefore award the objectors the costs of these proceedings. To sum up, therefore, I make the following orders:

(1) in respect of such of the awards made by the Collector which were accepted by the objectors and not referred to court, they are hereby affirmed;
(2) for the loss of the acquired land, the Collector's award of $322,272 is increased by 20% to $383,503.96;
(3) for severance and injurious affection, as follows:
  (a) loss of crops to make way for new drains and pond and to make way for an alternative road — nil
  (b) cost of new drains — $27,200
  (c) in default of a legally enforceable undertaking in writing by the state government of Penang as aforesaid in terms to be approved by this court, there shall be in favour of the objectors and their successors in title a declaration as to entitlement to reimbursement of all expenses reasonably incurred and properly substantiated for the maintenance (including dredging) of the branch drains concerned so as to ensure a smooth flow of water and waste in the main drains and thus preventing any flooding and damage to crops on the remaining unacquired lands of Bertam Estate. Such expenses shall be recoverable as a debt due and payable and in the event of there being any dispute as regards such claims, then the parties shall be at liberty to apply to court. For the avoidance of doubt, in the event of the said undertaking being given during the pendency of the appeal from this judgment, then the award of $27,200 for the cost of new drains cannot stand and must be rescinded for otherwise there would be double counting
  (d) cost of new fencing for the manager's bungalow — $ 4,700
  (e) cost of new fencing for the rest of the estate; 640 chains of barbed wire fencing on timber posts at $21.45 per chain — $13,728
  (f) cost of alternative road — nil
(4) interest at the rate of 8% pa on the sum awarded which is in excess of that awarded by the Collector at the inquiry for the period from the date of possession being taken of the acquired land, namely, 21 February 1980 to the date of payment;
(5) reimbursement of premia paid by the objectors for insurance for fire hazard, wind storm, personal accident/hospitalization, maintenance for weeding and rat bait/root disease and road licensing of estate vehicle; — nil
(6) refund of deposit paid by objectors; — $ 1,000
(7) reimbursement of fees paid to valuer and engineer always provided they have been reasonably incurred and properly substantiated;
(8) costs of these proceedings.

Order accordingly.

Solicitors: *Presgrave & Matthews.*

Reported by *Wong Kim Fatt*

Margaret Thavamoney Chellappah v United Asian Bank Bhd (Dr C Jeremiah & Anor, Third Parties)

HIGH COURT (SEREMBAN) – CIVIL SUIT NO 292 OF 1983
MUSTAPHA HUSSAIN J
31 MARCH 1989

Contract – Purchase of property – Property charged to defendant bank as security for the loan and overdraft accounts of third party – Dispute as to whether defendant bank agreed to discharge property at $93,500 – Question of fact

The plaintiff is the daughter of the third party. She had agreed to purchase a property known as No 1 Hose Road, Seremban, CT 2615, lot 334, township of Seremban, from her mother, the second third party. The said property was mortgaged to the defendant bank. On or about 4 June 1979 the plaintiff's father, the first third party, and the plaintiff went to the Kuala Pilah branch of the defendant bank and saw the manager of the branch, one Mr Palakrishnan, who was informed of the purchase and who told the plaintiff that the property was charged as security for the first third party's loan and overdraft accounts. The amount the first third party was owing the bank then was $93,500 and Mr Palakrishnan agreed that the property would be discharged on full satisfaction of the debt.

It was agreed that the plaintiff, who stayed in Dubai, would remit a sum of $3,500 periodically to the bank towards the repayment of the loan. She was advised by the bank manager to open an account with the bank to facilitate the periodic remittance from her in Dubai to be credited. She told the manager that no further advances were to be given to the first third party, the plaintiff's father, and that all her remittances